UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,	)	
	)	
and	)	Case No. 30-CA-17185
	)	
MILWAUKEE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO	)	
	)	

BRIEF OF THE AMICUS CURIAE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Statutes

II. INTEREST AND IDENTITY OF AMICUS CURIAE.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

NFIB supports the adoption of commonsense legal standards which make it easier for small businesses to comply with labor laws. Most small businesses do not have the resources to employ in-house legal departments, so they find broad and confusing legal rules, like those of *Sandusky Mall Co.*, particularly difficult to comply with. Without the aid of counsel to interpret complex regulatory regimes, it is not clear to many small business owners whether the laws apply at all. Additionally, since these broad rules often lack commonsense distinctions, many small business owners do not know which actions constitute violations of the law. For this reason, to fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

III. SUMMARY OF THE ARGUMENT

NFIB respectfully requests the Board abandon the *Sandusky Mall Co.* standard and adopt the *Register Guard* standard for evaluating unlawful discrimination in nonemployee access cases. First, the National Labor Relations Act makes it unlawful for employers to interfere with employees' rights to union organization and collective bargaining. While employers generally can exclude nonemployee union organizers from their property, the Supreme Court announced the discrimination exception in *Babcock & Wilcox Co.*, which provides that employers may not exclude unions if that exclusion is unlawfully discriminatory under the NLRA. The National Labor Relations Board interpreted the discrimination exception in *Sandusky Mall Co.* to mean that when an employer allows any nonemployee group or communication it is prohibited from excluding union communications. However, this interpretation was rejected by numerous Courts of Appeals as being too broad and inconsistent with what was intended by the Supreme Court in *Babcock & Wilcox*. Thus, the Board should discontinue its application of *Sandusky Mall Co.* in nonemployee access cases.

Second, the Board should no longer force employers to permit nonemployee union agents on to their private property when those agents' purpose is to harm the employer's business. Employers should have the right to control the message presented on their private property. In fact, courts of appeal and some members of the Board itself distinguish between protected union-organizing activities and activities intended to damage the employer. Employers should be able to prohibit nonemployee union agents from carrying out boycotts on the employer's private property. Boycotts are especially damaging to small businesses which may be completely wiped out if targeted.

Third, the Board should adopt the standard it announced in *Register Guard* when evaluating unlawful discrimination in nonemployee access cases. The standard announced in *Register Guard* allows for a finding of unlawful discrimination only if there is disparate treatment of activities of a similar character because of their union or other Section 7-protected status. This standard is consistent with the narrow exception contemplated by the Supreme Court in *Babcock & Wilcox* and of the interpretation adopted by numerous Courts of Appeals. The *Register Guard* standard is also a better standard for evaluating whether there is unlawful discrimination than *Sandusky Mall Co.* Since the *Register Guard* standard requires a finding of unequal treatment of equals, it allows businesses to better know what activities or communications they can lawfully prohibit from their property. Finally, because of its narrow focus on disparate treatment, the *Register Guard* standard provides small businesses, which do not have the resources for in-house legal or human resource departments, a commonsense and workable standard which respects their property rights and allows them to more clearly understand what they may do under the law.

IV. ARGUMENT

A. *Sandusky Mall Co.* is the Improper Standard for Evaluating Unlawful Discrimination in Nonemployee Access Cases.

The National Labor Relations Act (NLRA) governs labor practices, including unlawful discrimination, in the United States. Section 7 of the NLRA provides employees with rights related to organization of unions and collective bargaining.[1] The NLRA makes it an unfair labor practice "to interfere with, restrain, or coerce employees" in the exercise of their rights.[2] By its terms, the NLRA confers rights only on employees, not unions or nonemployee union

[1] *See* National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.
[2] National Labor Relations Act, § 8(a)(1), as amended, 29 U.S.C.A. § 158(a)(1).

organizers.[3] Thus, as a general rule employers may not be compelled to allow nonemployee union organizers onto their property.[4]

While an employer generally has a right to exclude nonemployee union organizers from her property, the Supreme Court announced the so-called "discrimination exception" in *Nat'l Labor Relations Bd. v. Babcock & Wilcox Co.*[5] There the Court said: "[a]n employer may validly post his property against nonemployee distribution of union literature if the reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message, and if the employer's notice or order does not discriminate against the union by allowing other distribution."[6] Thus, while employers generally have the right to exclude nonemployee union organizers, they must do so in a way that does not discriminate against unions.

1. The Board's Interpretation of the Discrimination Exception in *Sandusky Mall Co.* is not Consistent with that Contemplated by the Supreme Court in *Babcock & Wilcox.*

The Board's interpretation of the discrimination exception announced in *Babcock & Wilcox* is considerably broader than the Supreme Court intended. In *Sandusky Mall Co. v. N.L.R.B.*, the Board held that an employer violated Section 8(a)(1) of the NLRA when it denied union access to its property but permitted other individuals, groups and organizations for other activities.[7] The Board reasoned that allowing any outside group physical access precludes an employer from denying access to a union.[8]

The Board's interpretation of the discrimination exception as evidenced in *Sandusky Mall Co.* was broader than the exception originally intended by the Supreme Court. *Babcock &*

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[3] *See Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).
[4] *See N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).
[5] *See id.*
[6] *Id.*, at 112.
[7] *See Sandusky Mall Co.*, 329 N.L.R.B. No. 62 (1999).
[8] *Id.* at 621.

Wilcox heavily favored the private property rights of employers, thus the Court could not have contemplated as broad an exception as applied by the Board in *Sandusky Mall.*[9] For example, the Six Circuit Court of Appeals interpreted the discrimination exception more narrowly. In fact, the Board acknowledged in its ruling in *Sandusky Mall Co.* that that its interpretation of the discrimination exception differed from that of the Sixth Circuit, but adhered to its view that "an employer that denies a union access while regularly allowing nonunion organizations to solicit and distribute on its property unlawfully discriminates against union solicitation."[10] In its review of the Board's decision in *Sandusky Mall Co.*, the Sixth Circuit reaffirmed its ruling that "discrimination" as used in *Babcock & Wilcox* to mean "favoring one union over another, or allowing employer-related information while barring similar union-related information."[11]

2. Board Decisions Premised on this Broad Conception of Discrimination have been Rejected by Several Courts of Appeals.

The Board has consistently applied its broad interpretation of the *Babcock & Wilcox* discrimination exception. However, the Board misinterpreted *Babcock & Wilcox.*[12] Numerous circuit courts agree and have reversed, or denied the enforcement of Board decisions reliant on its broad interpretation of the discrimination exception evidenced in *Sandusky Mall Co.*

Importantly, the Board's decision in *Sandusky Mall Co.* was reversed by the Sixth Circuit.[13] In that case, a mall's no solicitation policy provided that organizations wishing to solicit on mall property file an application with the mall. The mall owner then determined whether to allow the solicitation by considering a number of factors including: whether the mall would receive an economic benefit, whether the activity is consistent with the commercial retail

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[9] *See Sandusky Mall Co. v. N.L.R.B.*, 242 F.3d 682, 686 (6th Cir. 2001).
[10] *See Sandusky Mall Co.*, 329 N.L.R.B. No. 62.
[11] *Id.* at 687.
[12] *See Sandusky Mall Co.*, 242 F.3d at 686
[13] *See id.*

purpose of the mall, or whether the activity conflicts with the business of a mall tenant.[14] The mall owner routinely allowed charitable, civic and even commercial organizations to solicit on mall property, but not union handbillers.[15] The Board found that the mall policy, allowing solicitation by various organizations but not unions, was sufficient proof of discrimination under the narrow *Babcock & Wilcox* discrimination exception.[16] In its reversal of the Board's ruling, the Six Circuit adopted the argument of a dissenting Board member that the alleged discriminatory conduct in allowing solicitation on handbilling required that the "discrimination be among comparable groups or activities," and that the "activities themselves under *consideration* must be "*comparable*."[17]

Additionally, in *Be-Lo Stores v. N.L.R.B.*, the Board held that when unions were denied access but the store permitted the occasional presence of "Muslims selling oils and incense," "an occasional Jehovah's Witness distribut[ing] the Watchtower magazine," and one Lions Club solicitation, unlawful discrimination had occurred.[18] On review, the Fourth Circuit overturned the Board's decision and found that the solicitations were too "isolated and sporadic" and did not establish disparate enforcement of the employer's no-solicitation policy.[19]

Furthermore, the Seventh Circuit Court of Appeals reversed a Board ruling that an employer had unlawfully discriminated against union solicitation.[20] The employer's no-solicitation policy allowed only "swap and shop" notices to be posted to workplace bulletin boards and refused the posting of notices regarding union organization. The Seventh Circuit

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[14] *See id.* at 690.
[15] *See id.* (In violation of the policy, a local union distributed handbills to mall customers, urging them not to patronize a business which hired nonunion contractors. The union handbillers were subsequently arrested for trespass.)
[16] *See Sandusky Mall Co.*, 329 N.L.R.B. No. 62.
[17] *See Sandusky Mall Co.*, 242 F.3d at 690.
[18] *See Be-Lo Stores v. N.L.R.B.*, 156 F.3d 268 (4th Cir. 1997).
[19] *See id.*
[20] *See Guardian Industries Corp. v. N.L.R.B.*, 49 F.3d 317 (7th Cir. 1997).

found that the Board failed to demonstrate how disallowing union organizing materials while allowing for-sale notices was discriminatory.

Finally, the Sixth Circuit Court of Appeals rejected the Board's interpretation of *Babcock & Wilcox*'s discrimination exception.[21] In *Cleveland Real Estate Partners v. N.L.R.B.*, the Sixth Circuit reversed a Board ruling of discrimination arising out of the ejection of union handbillers from a mall.[22] The Board found that when an employer allowed non-union related solicitation in the mall, that the employer's prohibition on nonemployee union representatives from distributing handbills directed at shoppers to discourage them from patronizing a nonunion retailer constituted unlawful discrimination.[23] In its review of the Board's decision, the Sixth Circuit held that after *Lechmere*, the "discrimination exception" should be interpreted narrowly and only bars favoritism of one union over another or barring union-related information while allowing employer-related information.[24]

The Board has faithfully applied its interpretation of the *Babcock & Wilcox* discrimination exception. However, the Board's interpretation, as evidenced in *Sandusky Mall Co.*, is neither consistent with that of numerous Courts of Appeals, nor what was contemplated by the Supreme Court in *Babcock & Wilcox* itself. Thus, the Board should no longer apply the standard announced in *Sandusky Mall Co.* to evaluate unlawful discrimination in nonemployee access cases.

B. The Board Should Not Force Employers to Permit Nonemployees to Trespass on Their Private Property in Order to Harm the Employer's Business.

The Board should no longer require employers to allow nonemployee union organizers to trespass on private property for the purpose of injuring the employer's business. Private property

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[21] *See Sandusky Mall Co.*, 329 N.L.R.B. 62.
[22] *See* 95 F.3d 457 (6th Cir. 1996).
[23] *See id.*
[24] *See Sandusky Mall Co.*, 329 N.L.R.B. No. 62, at 620.

rights are essential an employer has a "basic property right" to regulate the use of the company property.[25] Therefore, an employer must have control over the messages it conveys to its customers on its private property.[26] Courts of appeals and members of the Board itself have distinguished between protected union organizing activities and activities such as boycotts, which are designed to harm an employer's business. For example, the Sixth Circuit affirmed that nonemployee union agents engaged in a boycott have no right to engage in handbilling on the employer's private property.[27] Additionally, in *Sandusky Mall Co.*, dissenting Board Member Brame acknowledged that an employer must be allowed to make distinctions based on the extent that the business will be negatively affected by an activity.[28]

Boycotts and other activities aimed at harming an employer's business particularly affect small businesses. Boycotts of large corporations certainly send a message by driving business away, but boycotts of small businesses, which have smaller gross revenues, can be devastating. Many small businesses would be completely wiped out if targeted by a boycott. Legally requiring a small business owner to allow nonemployee access to his or her private property for the outward purpose of harming the business is tantamount to a "taking" under the Constitution.[29]

Thus, the Board should no longer require employers to permit nonemployee union organizers access to the employer's private property for the purpose of harming the employer's business.

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[25] *See Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983).
[26] *See Riesbeck Food Markets v. NLRB*, 1996 WL 405224, at *1.
[27] *See Sandusky Mall Co.*, 242 F.3d 682.
[28] *See* 329 NLRB at 628.
[29] *See Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 569 (1972).

C. The Board Should Adopt the Disparate Treatment-Focused Standard Announced in *Register Guard* when Determining Whether an Employer Unlawfully Discriminates in Nonemployee Access Cases.

If the *Babcock & Wilcox* discrimination exception applies in cases involving nonemployee access, especially those of consumer boycotts, the Board should adopt a more narrowly-tailored definition of "discrimination." A commonsense conception of unlawful discrimination would require disparate treatment of comparable activities. An intuitive rule like this makes it simpler for employers, especially small business owners who do not have the services of in-house legal departments, to understand what they can and cannot do. To this end, the Board should adopt the standard it announced in *Guard Publishing Company v. N.L.R.B.* (*Register Guard*)[30] to determine whether unlawful discrimination occurred in nonemployee access cases.

In *Register Guard*, the Board addressed the alleged discriminatory enforcement of a policy prohibiting employees from using the employer's email system for non-job-related solicitations.[31] The employer's policy formally prohibited the use of email for non-job-related solicitations, but in practice the employer did allow for some non-job-related solicitations.[32] Despite this widely known practice, the employer disciplined an employee for sending union-related emails using the employer's email system.[33] The Board ruled that an employer may lawfully bar employees' non-work-related use of its email system unless the employer's policy is discriminatory.[34] According to the Board in *Register Guard*, "unlawful discrimination consists

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[30] *See* In Re the Guard Publ'g Co., 351 NLRB No. 70, 1110 (2007).
[31] *See id.*
[32] *See id.*
[33] *See id.*
[34] *See id.* at 1116.

of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status."[35]

1. *Register Guard*'s Disparate Treatment Standard for Finding Unlawful Discrimination is Consistent with Courts' of Appeals Interpretation of *Babcock & Wilcox*.

A discrimination standard based on a finding of actual disparate treatment of similarly situated groups is consistent with the *Babcock & Wilcox* discrimination exception. It has long been the law that an employer is permitted to control the activities of his employees both as a matter of property rights, since the employer owns the building, and of contract, since employees agree to abide by company policy as a matter of employment.[36] As discussed above, numerous circuit courts have rejected a broad definition of discrimination like that stated in *Sandusky Mall Co.*, where when the employer permits any outside group, whether commercial or charitable, physical access to the property, the employer is precluded from denying physical access to nonemployee union representatives. Instead, courts held that while an employer may not discriminate against Section 7 activity, "discrimination" requires a finding of "unequal treatment of equals."[37] There, a rule banning all organizational notices was impossible to understand as disparate treatment of unions.[38] Applying the same disparate treatment analysis, the Seventh Circuit found in *Fleming Companies, Inc. v. N.L.R.B.* that permitting personal postings on company bulletin boards did not preclude an employer from prohibiting union literature to be posted.[39] The enforcement of that policy did not demonstrate that unions were treated disparately.

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[35] *See id.* at 1119.
[36] *See e.g., Guardian v. N.L.R.B.*, 349 F.3d at 317.
[37] *See id.* at 319.
[38] *See id.* at 320.
[39] See 349 F.3d 968, 975 (7th Cir. 2003).

2. The Disparate Treatment Approach Announced in *Register Guard* is Easier to Apply than *Sandusky Mall Co.*

Aside from being consistent with Courts' of Appeals interpretation of *Babcock & Wilcox*, the disparate treatment standard adopted by the Board in *Register Guard* is also a better way to judge whether unlawful discrimination has occurred. In fact, the Board explicitly repudiated its own precedent in *Register Guard*, finding that the Seventh Circuit's analysis in *Guardian* and *Fleming* better reflect the principle that "discrimination means the unequal treatment of equals."[40] In fact, a dissenting Board member in *Sandusky Mall Co.* argued "the parameters of the Board's application of the so-called "discrimination exception" first articulated in [*Babcock & Wilcox*] are so vague that the Board must resort to subjective, "I know it when I see it" criteria...thus leaving employers without fair notice of what they may lawfully do."[41]

Register Guard's requirement of actual disparate treatment between similar communications or activities is more narrowly-tailored and easier to follow for employers. As explained by the Board in *Register Guard*, an employer would clearly violate the NLRA if she permitted employees to use email to solicit for one union but not another because the employer differentiated between activities based only on Section 7 grounds.[42] However the NLRA does not prohibit an employer from discriminating on a non-Section 7 basis.[43] Employers could draw lines between charitable and non-charitable solicitations, between solicitations of a personal nature and commercial solicitations, or between invitations for an organization and invitations of a personal nature.[44] Thus, the *Register Guard* standard provides a better standard, both for

[40] See 351 NLRB No. 70.
[41] 329 N.L.R.B. No. 62 (Brame, dissenting).
[42] *See* In Re the Guard Publ'g Co., 351 NLRB at 1118.
[43] *See id.*
[44] *See id.*

businesses in crafting their no-solicitation policies, and for courts in evaluating whether those policies comply with the law.

3. The *Register Guard* Standard is Preferable for Small Businesses Because it Provides a Narrow Standard that Respects Businesses' Rights, While Making it Easier for Them to Comply with the Law.

Small businesses support commonsense legal standards. The *Sandusky Mall Co.* standard is confusing to courts, but is entirely baffling to small business owners. Most small businesses simply do not have the resources for in-house legal departments or human resource specialists so they are left to decipher complex regulatory regimes on their own. Thus, an intuitive rule like that announced in *Register Guard*, unlike the ad hoc "I know it when I see it" approach currently employed, is preferable for small businesses.

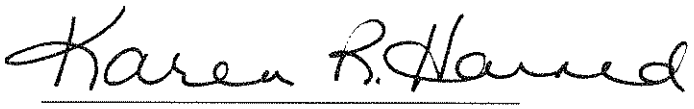
The *Register Guard* standard of discrimination in nonemployee access cases is the correct approach and is beneficial for small businesses. When crafting and enforcing a no-solicitation policy, small business owners should have fair notice of what they may lawfully do. A rule that defines discrimination as disparate treatment of similar activities, along Section 7 grounds provides small business owners a workable, commonsense standard for their no-solicitation policy. *Register Guard* provides such a definition. For example, small business owners could differentiate between charitable solicitations, like those for the Red Cross, but prohibit non-charitable solicitations, like those for Avon or for union organization.[45] Allowing small business owners to rightfully distinguish between activities on Section 7 grounds grants them autonomy to decide which messages are presented on their property and it helps business owners know what activities are in compliance with the law.

[45] *See id.*

V. CONCLUSION

For the reasons stated above, the NFIB Legal Center respectfully asks the Board to overrule its holding in *Sandusky Mall Co.* The Board should no longer force employers to permit nonemployee union organizers access to their private property for the purpose of harming the business and should adopt the *Register Guard* standard of disparate treatment when evaluating unlawful discrimination in nonemployee access cases.

Respectfully Submitted,



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Certificate of Service

I certify that on January 7, 2011 I caused a true and correct copy of the foregoing Amicus Curiae Brief of the National Federation of Independent Business to be served on the following counsel by E-Mail or Federal Express overnight delivery:

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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